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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 433

W. D. LYONS,

Petitioner,

vs.

THE STATE OF OKLAHOMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OKLAHOMA.

BRIEF ON BEHALF OF PETITIONER.

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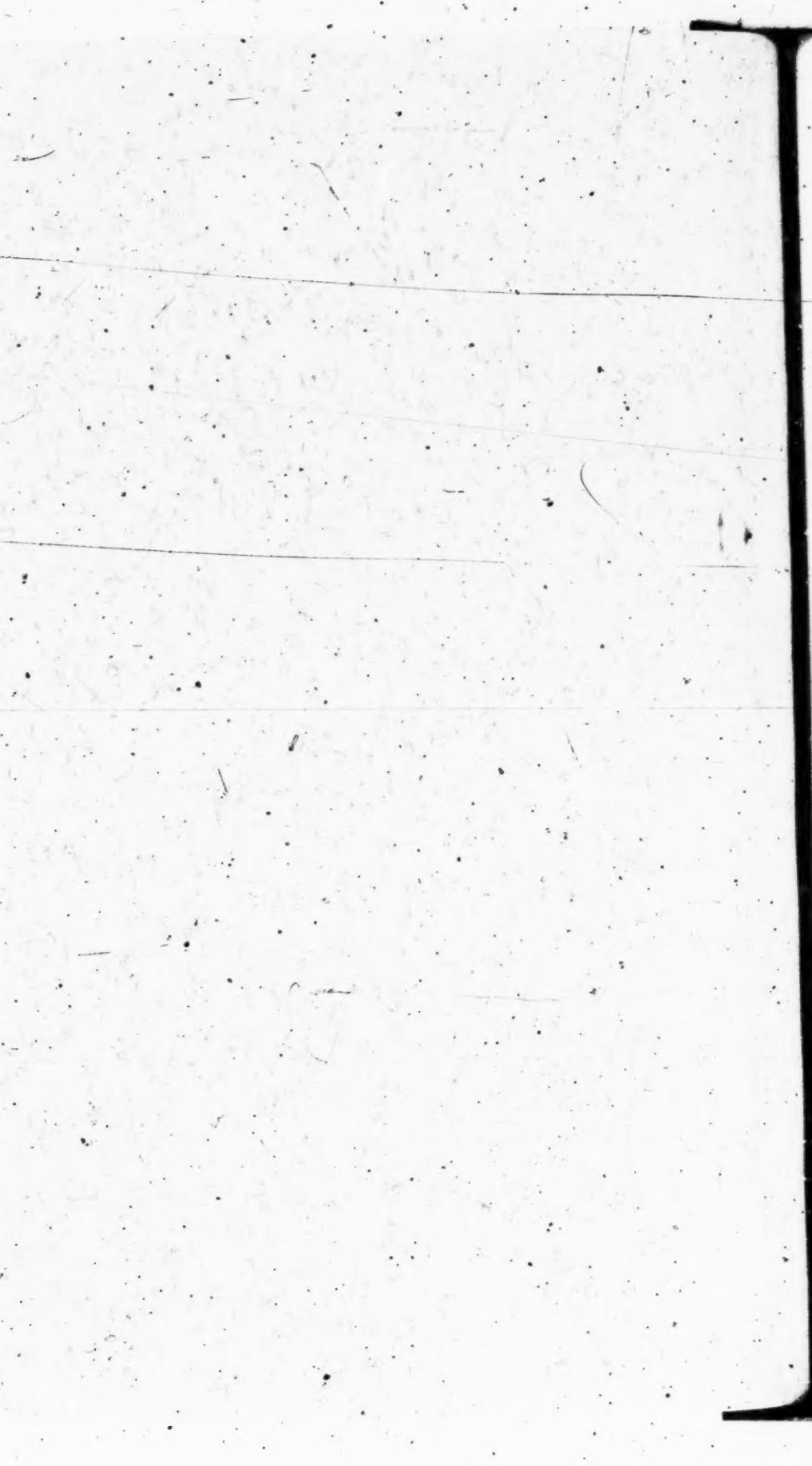
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THE STATE OF OKLAHOMA.

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Opinions Below.

No opinion was rendered by the District Court of Choctaw County, Oklahoma, before which Court the case was tried.

The opinion of the Criminal Court of Appeals of the State of Oklahoma appears in the record at pp. 284-337. It is reported in 138 P. (2d) 142. The dissenting opinion to the order denying the Petition for Rehearing appears in the record at pp. 346-355 and is reported in 140 P. (2d) 248.¹

¹ The order denying Petition for Rehearing was signed by only one of the Justices of the Criminal Court of Appeals in Oklahoma without opinion (R. 346).

Jurisdiction.

Certiorari to review the judgment of the Criminal Court of Appeals of the State of Oklahoma entered herein on July 21, 1943, was granted by this Court on November 22, 1943 (R. 355), upon a petition therefore filed on October 18, 1943, and based upon Section 237(b) of the Judicial Code (28 U. S. C. 344).

Statement of the Case.

This action was commenced in the District Court of Choctaw County, State of Oklahoma, on the 24th day of August, 1940, by the filing of an information. This information charged W. D. Lyons and one Van Bizzell jointly with murdering one Elmer Rogers (R. 4-7).

W. D. Lyons was arraigned on December 30, 1940 (R. 8) and on January 27, 1941, a severance was granted and W. D. Lyons was placed on trial (R. 9). He was convicted of murder on January 31, 1941 (R. 272). On February 10 the petitioner filed his motion for new trial (R. 275-277). On the same day the motion for new trial was overruled (R. 277).

On the same day the petitioner was sentenced to life imprisonment (R. 278). On the same day petitioner gave notice in open court of his intention to appeal to the Criminal Court of Appeals (R. 280-281).

Statement of Facts.

Late on the night of December 31, 1939, Elmer Rogers, his wife and one son were brutally murdered in their home near Fort Towson, Oklahoma. Another son, James Glenn Rogers, escaped with his smaller brother, Billie Don. Both Mr. and Mrs. Rogers were shot with a shotgun and the house set afire, burning both of them and one of the young boys.

The crime aroused the entire community and there was much newspaper publicity. Shortly thereafter several white prisoners from a nearby prison camp were arrested for the crime (R. 102-103, 179). This brought about additional publicity condemning the Oklahoma State Prison System (R. 111). Warden Jesse Dunn of the State Prison System was sent to Fort Towson and began a personal investigation of the situation (R. 102 and 111), and shortly thereafter made a change in officials in charge of the prison camp (R. 111).

Vernon Cheatwood, special investigator for the Governor of Oklahoma, was sent to Fort Towson after the convicts from the nearby prison camp had been arrested for the crime (R. 178-179). Vernon Cheatwood had been a special investigator for six or seven years and had much experience in obtaining confessions (R. 177-178). During his investigation the prisoners arrested for the crime were released and W. D. Lyons, a young Negro, was arrested in Hugo, Oklahoma (R. 179).

The "Arrest".

On the night of January 11, 1940, W. D. Lyons left his mother-in-law's home to get a drink of illegal whiskey hidden in the woods and on his way back met Ennis Aikens (R. 208). Aikens, a witness for the State of Oklahoma, testified that he and Lyons saw several cars of police officers drive up to the home of Lyons' mother-in-law and that Lyons requested him to go down to the house and ask his wife "what the trouble was down there" (R. 138). Shortly thereafter Lyons returned to the house and was met by two men with drawn revolvers. Reasor Cain and Oscar Bearden made the "arrest" (R. 127). Reasor Cain at that time was a special officer for the Frisco Railroad but is no longer employed by the Frisco (R. 128). The employment of Oscar Bearden does not appear in the

record. These two men promptly seized Lyons and since they did not have handcuffs they bound his arms behind his back with his belt (R. 129). The men then started toward the jail with Lyons (R. 129).

About three blocks from the court house and jail Reasor Cain broke off a piece of one-inch board lying on the street and Oscar Bearden struck Lyons on the head with this board (R. 30, 209). He then kicked Lyons and threatened his life by telling him they were going to burn him and kill him by degrees unless he "confessed" (R. 30). About a block from the jail they bumped Lyons' head against a tree (R. 30, 209). When they reached the jail, the jailor, Leonard Holmes, greeted Lyons by striking him in the mouth with the jail keys which weighed about five pounds (R. 30, 209).

Events Leading Up To The Confessions.

Bearden then told Cain and Holmes to "get some more officers, and we will drag him through 'colored town' and let the rest of the Negroes learn a lesson" (R. 209). Harvey Hawkins returned and reported there were no more officers around at that time. The jailor and Deputy Sheriff Floyd Brown then carried Lyons to the top floor of the women's side of the jail where Floyd Brown kicked him and knocked him down with his fist (R. 209). While on the floor Lyons was kicked in the stomach and ribs by Brown (R. 30-31, 210). Lyons was then placed in a cell.

After about five minutes Lyons was carried downstairs to a small room adjoining the sheriff's office. In this room at the time were the sheriff, two deputy sheriffs, the state ballistic expert, two highway patrolmen, and the state investigator (R. 31). Roy Harmon, sheriff and state's witness, admitted there were at least three or four men in the room besides Lyons (R. 62).

These officers beat Lyons again and bumped his head against the wall. One of the officers made Lyons stand against a wall with his hands stretched above his head while the officer, with cowboy boots on, kicked the skin off the shins of Lyons' legs (R. 32). An investigator kicked him in the stomach and blacked Lyons' eye (R. 32). The local constable also beat him and threatened him in an effort to make him confess (R. 33). The sheriff questioned Lyons for about thirty minutes and then the beatings were resumed until the sheriff stopped them again and had Lyons carried upstairs to a cell (R. 210).

Although the officers denied beating or threatening Lyons, one witness subpoenaed by the State, corroborates Lyons' testimony. She testified that she saw him in the jail at Hugo and noticed that his eye was blackened, his arms were bruised. She testified further that he could hardly walk (R. 87-89).

First Confession.

Eleven days later, about six-thirty in the evening, one of the highway patrolmen and Floyd Brown took Lyons from his cell to the office of the county prosecutor. On the way the highway patrolman struck Lyons on the head with a blackjack (R. 211). Cheatwood met them in the hall and told the officer not to hit Lyons on the head because "I know how to get it out of him when we get him up here" (R. 211). He was then carried to the county prosecutor's office in the court house.

Sheriff Roy Harmon testified the room was about 14 or 16 feet square (R. 63). According to the testimony of witnesses for the State of Oklahoma, from time to time during the night there were at least twelve men in that room. They were the following:

1. Floyd Brown (R. 63, 68, 156).
2. Roy Harmon (R. 59, 68, 72, 130).
3. Van Raulston (R. 114).

4. Vernon Cheatwood (R. 64, 130, 156).
5. Harvey Hawkins (R. 63, 68, 72, 74, 130, 643).
6. Other highway patrolman (R. 63; 130).
7. County Prosecutor Norman Horton (R. 63, 72).
8. Assistant Prosecutor (R. 63, 130).
9. Reasor Cain (R. 130).
10. Howard Rorie (R. 68).
11. "Mr. Holmes" (R. 68).
12. Jess Faulkner (R. 136).

Lyons was handcuffed and put in a chair while Vernon Cheatwood with a blackjack in his hands sat in a chair directly in front of Lyons and about eight or ten inches from him. One of the highway patrolmen was sitting on one side of Lyons with Reasor Cain standing behind him (R. 211). The County Prosecutor was asking the questions (R. 211).

During the questioning Vernon Cheatwood was beating Lyons on the knees, hands, arms and legs with a blackjack. This weapon was described by Lyons as "about two inches wide and about three-fourths of an inch thick on the end, and about a foot and a half long, and every time he hit me with it something in it would rattle like buck shot or steel balls" (R. 211). Every now and then Reasor Cain would strike Lyons with his fist. Lyons also testified that "when Mr. Reasor Cain got tired the highway patrolmen would take it awhile, about an hour and a half to two hours each, and they beat me that way all night and yelling questions . . . they would say, 'You killed those people, didn't you? You God damned black son-of-a-bitch, you are going to tell me before we turn you loose' . . . He said I was going to sing a different song before forty-eight hours from now" (R. 212).

Cheatwood, Cain and now and then the highway patrolmen, would take Lyons out of the chair and bend him across a table while Cheatwood beat him on the back of the head with the blackjack. Then they would put Lyons back in

the chair and start beating him on the legs and arms again (R. 212). Cheatwood also threatened "to stick red-hot irons" to Lyons to make him confess (R. 36).

About two-thirty in the morning the officers brought in a pan of bones and placed them in Lyons' lap. The use of the bones from the bodies of the dead people was freely admitted by officers of the State of Oklahoma (R. 73, 174, 175). The effect of this on Lyons was explained by him in the following testimony: "They said they was the bones of Mrs. Rogers, Mr. Rogers and the baby; and I had never seen any bones of a dead person before, had I ever seen dead people before, and was I afraid of those bones on my lap in the pan. Mr. Cheatwood would lay the ones on my hands, such as teeth and body bones, and make me hold it and look at it, wouldn't let me turn my head away, and beat me on the hands and knees" (R. 213). These officers continued to question and beat Lyons until about four-thirty the next morning (R. 38). At about this time Lyons made a "confession" because they "beat me and beat me until I couldn't stand no more, until I gave in to them and answered the questions that they demanded" (R. 38). Even then he denied killing Elmer Rogers but later answered the question "yes" because "I was forced to . . . I was beat with a blackjack, tortured all night long—because I feared I would get some more torture" (R. 39).

Then Lyons was lifted from the chair and led downstairs and over to the jail where he remained about five minutes after which time three of the officers brought him back to the sheriff's office (R. 39-40). He was held there while the officers ate their breakfast and was then carried to the scene of the crime in Fort Towson (R. 40).

In the car with Lyons were one of the highway patrolmen, Floyd Brown, the assistant prosecuting attorney and Vernon Cheatwood (R. 40-41). During the trip to Fort Towson the highway patrolman and Cheatwood threatened Lyons

(R. 41).. Cheatwood told Lyons they were taking him to Fort Towson to kill him and he should say his prayers (R. 41).

At the scene of the crime Floyd Brown and Harvey Hawkins threatened to burn him and beat him with a pick hammer if he did not do as they told him (R. 42). Lyons was standing facing a fire that had been built and with his back to the officers Brown and Hawkins. When he turned around Hawkins had an axe in his hand saying that Lyons knew something about it. They threatened to torture him again if he did not say he had had the axe (R. 44).

In the meantime Cheatwood and the assistant prosecutor went to the home of the family of Mrs. Rogers. E. O. Coleclasure, father of Mrs. Rogers, testified that Cheatwood showed him a blackjack and told him "I beat that boy last night for, I think, six—either six or seven hours * * * I haven't even got to go to bed last night" (R. 262). Mrs. Vernon Coleclasure, sister-in-law of Mrs. Rogers testified that Cheatwood showed her the blackjack also and stated he beat Lyons "from his knees on down" (R. 260).

Cheatwood and the assistant prosecutor returned to the scene of the crime with Vernon Coleclasure. In the presence of these people Harvey Hawkins asked Lyons if he had not hidden the axe where it was found. Lyons denied that he knew about the axe (R. 216).

Cheatwood asked Lyons to show him where he had been hunting on the day prior to the murder. Lyons took them about a half a mile southeast from the scene of the murder and showed them where he had been shooting while hunting and also showed them where he had discarded some empty shells from his shotgun (R. 216-217).

Lyons was returned to the jail around 8:30 in the morning and he was again placed in the women's side of the jail. At this time his eye was still closed, his lip broken and his

nose was bleeding (R. 218). At about 2 o'clock in the same afternoon the assistant county attorney, a Mr. Haskell, with two highway patrolmen and Vernon Cheatwood brought Lyons a paper to be signed. Lyons asked what the paper was and Cheatwood said "never mind", whereupon Lyons signed the paper (R. 218). During this entire period Lyons did not have a lawyer to consult nor had any lawyer been appointed to defend him or to protect his rights (R. 218).

● *Second Confession.*

About fifteen minutes later Cheatwood and the Sheriff carried Lyons to the front of the jail where pictures were taken. Immediately thereafter, on the same day, Reasor Cain and Floyd Brown placed Lyons in an automobile and carried him to the Antlers, Oklahoma, jail where they arrived at about 4 o'clock in the afternoon (R. 219).

Cheatwood, the Governor's special investigator, returned to the Webb Hotel in Hugo and in the presence of people sitting in the lobby told the porter to "go up to my room and get me my nigger beater" (R. 256). The porter went to the room and brought back a blackjack. Whereupon Cheatwood stated: "This is what I beat the nigger boy's head with" (R. 257). Cheatwood also described the blackjack to the clerk of the Webb Hotel (R. 258). On the night prior to the trial in this case Cheatwood suggested to the clerk that he forget what he had said to him about the blackjack (R. 258).

About sundown Deputy Sheriff Van Raulston and Roy Marshall took Lyons from the jail at Antlers and carried him to the penitentiary at McAlester, Oklahoma. During the trip Deputy Sheriff Van Raulston continued to threaten Lyons and stated "We ought to hang and bury him right here". Van Raulston also explained that they could tell the courts Lyons had attempted to run away and nobody would do anything about it (R. 219).

As soon as they arrived at the penitentiary Warden Jesse Dunn was summoned and Lyons was carried to the Warden's office. This was about 10 or 10:30 the night of the same day Lyons made his "confession" at Hugo (R. 116, 117, 170, 220). Warden Dunn asked Van Raulston whether "that is the nigger that did the shooting" (R. 220). Van Raulston replied, "He has already admitted some in the confession in the jail house". When Warden Dunn asked Lyons about the murders and Lyons told him he did not know anything about them both Warden Dunn and Deputy Sheriff Van Raulston questioned Lyons for about two hours and Lyons continued to deny that he knew anything about the murders. Whereupon Deputy Sheriff Van Raulston said, "I will make him talk" (R. 220). Van Raulston took a blackjack out of a desk and started beating Lyons on his knees, hands, legs and shoulders. He continued to beat Lyons and threatened him for about an hour and a half or two hours (R. 221).

After this continued beating Lyons answered the questions as he was instructed to answer them. Lyons made these statements "Because I couldn't stand any more of the beating" (R. 221). A stenographer was called in who took down the alleged statement. Warden Dunn and Deputy Sheriff Van Raulston talked in a mumbling, low tone to the stenographer while Lyons merely nodded his head. Lyons had been without drinking water since about 12 noon of the same day and asked the Warden for water (R. 221). After this was completed Lyons was taken to the kitchen to eat. Lyons was returned to the Warden's office where the "confession" was signed. The Warden then told one of the guards to take Lyons to the basement. He was then placed in a cell about 15 feet from the electric chair. Prior to this time Warden Dunn had threatened Lyons by telling him how many men he had sent to death in the electric chair during the time he was Warden (R. 223). Lyons spent the

entire night in the death cell (R. 2-3). On the next day they carried him up on the fourth floor of the penitentiary where he remained until the preliminary hearing. During this time Lyons did not have an attorney to represent him (R. 106).

During the time Lyons was confined to the penitentiary Cheatwood visited him several times (R. 112).

Two or three days after Lyons was placed in the penitentiary Sheriff Cap Duncan, who at that time was a sergeant of the Guard in the penitentiary talked to Lyons in his cell and it is alleged that Lyons admitted to him that he and Van Bizzell killed the Rogers family (R. 124-125).

On Saturday, January 27, Reasor Cain, Van Raulston and Vernon Cheatwood carried Lyons into the Warden's office with two penitentiary guards. Cheatwood placed handcuffs on Lyons and asked him whether or not he was going to get on the stand at his preliminary hearing and swear that he and Van Bizzell killed the Rogers family. When Lyons told him he would not do this Cheatwood began beating him again with a blackjack until Lyons stated he would get on the stand and admit the murders (R. 223-225). Lyons was then carried back to Hugo for preliminary hearing.

Sheriff Roy Harmon told Lyons that they were afraid of mob action and that the National Guard had been called out for the preliminary hearing (R. 68). At the preliminary hearing two local attorneys appointed by the Court to defend Lyons refused to act and were excused by the court (R. 91). Nevertheless, W. D. Lyons, without representation by counsel, was subjected to a preliminary hearing (R. 21) and was returned to the State Penitentiary.

With the exception of the confessions the only evidence produced by the State was that: (a) Lyons was carrying a 12-gauge shot gun wrapped in newspaper in the colored section of Fort Towson on the day of the murder; (b) that

he purchased six number 4 shot gun shells from the local store on the day of the murder; (c) that Mr. and Mrs. Rogers were killed with number 4 shot from a 12-gauge shot gun; (d) officers testified that on the morning of the confession Lyons pointed out a spot at the scene of the crime where an axe was buried.

Lyons admitted he had borrowed a 12-gauge shot gun on that day for the purpose of hunting and that he purchased some shells (R. 205). Lyons had bought shells at the same store several times before. He carried the gun wrapped in newspaper while in town because he did not have a hunting license (R. 206).

On the day following the murders Lyons went hunting about a half-mile from where the Rogers home had been (R. 205-207). Lyons shot twice at a rabbit and missed. He left the empty shells on the ground (R. 206). The gun Lyons borrowed was broken and the trigger would not stay cocked so that the hammer had to be released at the same time the trigger was pulled.

Lyons denied that he pointed out the spot where the axe was supposed to have been buried (R. 216). Clarence Keyes, who was a deputy sheriff at the time of the crime, testified that immediately after the crime was committed the grounds were carefully raked in search of the axe used in the murder and that no axe was on the ground at that time nor at any place under the soil close enough to be reached by the rake (R. 195-200).

Errors to Be Urged.**I.**

THE CONVICTION OF PETITIONER BY MEANS OF CONFESSIONS OBTAINED BY COERCION AND OTHER ILLEGAL METHODS WAS A DENIAL OF DUE PROCESS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE CONVICTION OF PETITIONER BY MEANS OF EVIDENCE OBTAINED IN DISREGARD OF THE LAWS OF THE STATE OF OKLAHOMA AND REFUSAL OF THE COURTS TO SUPPLY ANY CORRECTIVE PROCESS WAS A DENIAL OF THE EQUAL PROTECTION OF ITS LAWS AND A DENIAL OF DUE PROCESS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.**I.**

The conviction of petitioner by means of confessions obtained by coercion and other illegal methods was a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The entire case of the State of Oklahoma against the petitioner rested upon an alleged confession and an alleged admission while at the State Penitentiary. The only material evidence other than the confessions is that the petitioner borrowed a shot gun, purchased some shells and was hunting with a 12-gauge shot gun near the scene of the crime on the morning preceding the killing. This was freely admitted by the petitioner as well as the fact that he was also hunting in the same vicinity on the day after the crime was committed. The other evidence is that the

deceased was killed by shot from a 12-gauge shot gun.² Empty shells admittedly dropped by petitioner during his hunting were fired from the same gun used by petitioner while hunting. The testimony that petitioner on the morning of the confession pointed out to state officials where he hid the axe was denied by petitioner. The former deputy sheriff of Choctaw County testified that shortly after the crime had been committed, all of the ground was raked in search of an axe and that no axe had been found on the scene at that time.

It is apparent from the record in this case that there were two confessions. One made at Hugo, Oklahoma, at about 4:30 in the morning of January 23, 1940 (R. 38), hereinafter referred to as the "first confession"; the other at the penitentiary at McAlester some time before 11:00 o'clock on the night of the same day (R. 50), hereinafter referred to as "second confession". The prosecution, realizing the clear inadmissibility of the first confession, sought to introduce in evidence the second confession. Objection to the introduction of this confession was promptly made and the jury excluded. After hearing evidence on the admissibility of the confession the trial judge refused to admit the first confession in evidence on the ground that: "The defendant may have been frightened into making the confession that was made here in the court house, by long hours of questioning and by placing bones of the purported bodies of the deceased persons in his lap during the questioning" (R. 89).

The Court, however, admitted into evidence the second confession over the objection of the petitioner (R. 90). The prejudicial error of the Court's ruling admitting the second confession is apparent from the statement of the judge,

² It was obviously impossible to connect the shot which killed the deceased with the gun carried by the defendant.

made later in the trial in commenting upon the second confession: "They were permitted to bring it out for this purpose: They contended that the defendant was still scared when we went to Oklahoma City. *The Court was of the opinion that several days had elapsed.* At the time, it was not made clear to the Court that both confessions were made on the same day, as I get it now." (Italics ours) (R. 231).

First Confession.

The participation of the State of Oklahoma in the denial of due process to the petitioner is clearer in this record than in many similar cases. As a result of tremendous newspaper publicity brought about by the arrest of certain convicts of a nearby prison camp, Warden Jess Dunn was rushed to the scene (R. 111). The Governor sent one of his best investigators to the scene at about the same time. After the arrival of the Governor's investigator, Vernon Cheatwood, the prisoners from the convict camp were released and W. D. Lyons was arrested (R. 179). Cheatwood remained in the case until after the conviction of Lyons.

It is admitted that the first confession was secured in the court house itself and it is also admitted that officials of the State of Oklahoma brought in the bones of the deceased persons who had been dead for twenty-two days, and placed them in the lap of the petitioner while he was being questioned over a long period of time in the court house (R. 182-183). This action on the part of officials of the State of Oklahoma, admitted by them to be true, will forever remain a disgrace to law enforcement in the United States. Such action is in direct violation of the principle established by this Court in the case of *Brown v. Mississippi*; * * * * * The rack and torture chamber may not be substituted for the witness stand * * * * *.

* 297 U. S. 278, 285 (1936).

The petitioner testified as to the threats, coercion and beating he received at the hands of the officials of the State of Oklahoma prior to his confession (R. 26-57). Although all of the witnesses for the prosecution denied any beating of the petitioner, the county prosecutor in his opening statement admitted: "and that after this defendant, W. D. Lyons, was questioned for long hours about this transaction, he finally admitted that he and Van Bizzell killed those people" (R. 12). During the examination of Lyons by the county prosecutor the following admissions were made:

"Q. I wasn't there in the office until six thirty was I, when they beat you? Isn't it true that Vernon Cheatwood had a strap of leather, and was tapping you like that, and because you refused to answer questions they put to you?

"By Mr. Belden: We object to the attempt to intimidate the witness.

"By the Court: Don't intimidate the witness, just the ordinary tone of voice.

"A. That blackjack he had was loaded.

"Q. How do you know it was loaded? You were insolent to the officers, and sat and sulked when I asked you questions, isn't that true?

"A. No sir.

"Q. You say they kept you in the office until four-thirty the next morning?

"A. That is right.

"Q. And beat you?

"A. That is right.

"Q. Isn't it true that you refused to answer, and they struck you on the knee with a piece of leather?

"A. They struck me all night. I didn't rest any" (R. 55).

Mr. Horton also made the following statement during the same cross-examination:

"Isn't it true that after they got through hitting you, as you say, with a strap of leather, and you refused to

answer any questions at all times, that I made them stop whipping you, and told them to get out of the room, and I asked you if you wouldn't talk to me alone? Is that right?" (R. 56).

Second Confession.

Deputy Sheriff Van Raulston was one of two men who carried the petitioner to the State Penitentiary where the second confession was obtained on the same night (R. 50). Van Raulston admitted that he was present in the county attorney's office during part of the time preceding the obtaining of the first confession and during the time petitioner was being questioned (R. 114). Petitioner testified that Van Raulston beat him prior to the making of the second confession (R. 48-50).

Petitioner had no sleep between Sunday night and Tuesday night, the night of the second confession (R. 50). Lyons testified:

"He beat me awhile longer, until I couldn't stand it any more, I was already hurting from—already hurting from that last night beating. I hadn't had any sleep since that Sunday night. It was Tuesday night then. Mr. Van Raulston asked me was I ready to answer his questions? and I told him yes, and Mr. Dunn he sent and got a stenographer and Mr. Dunn and Mr. Van Raulston was telling me how the crime happened" (R. 50).

In an effort to bolster the second confession, Van Raulston testified that he had recently been in an automobile accident and was physically unable to beat petitioner. If it were true that Van Raulston was unable physically to beat petitioner or to protect himself, it is unbelievable that such an officer would be entrusted with the duty of transporting a man charged with a triple murder from one county into another county in an automobile.

It should also be noted that the Chaplain of the State Penitentiary, who was a witness to the second confession

and who was the only completely disinterested person present, was not produced at the trial.

Admission to Sheriff Duncan.

Sheriff Duncan, at that time a sergeant at the Oklahoma State Penitentiary, a few days after the second confession, testified that he secured from Lyons an admission that Lyons had killed the deceased (R. 124-126). This alleged admission was made while the petitioner was still under the influence of prior intimidation, coercion and beating, which intimidation continued up to the time of the arraignment.⁴ No further effort was made by the prosecution to show that the influence prior to the first and second confessions had been removed at this time, two or four days thereafter.

Petitioner testified as to the long period of questioning, threatening, and beatings on the night of January 22 and morning of January 23 prior to the first confession. According to the testimony of witnesses for the prosecution there were at least twelve officers and individuals in the room during this period. The prosecution only called four of these persons. Each of these men testified that they were not in the room during the entire time Lyons was there and therefore they could only testify as to what happened while they were in the room. It seems that the only person present the entire time, with the exception of Lyons, was Vernon Cheatwood and it is significant that he was not called to the witness stand by the prosecution during the time the question of the admissibility of the confession was being considered.

Aside from the beatings during the hours preceding the confession, the act of placing the bones from Mr. and Mrs. Rogers' bodies on Lyons' lap and forcing him to pick them

⁴ On the morning of the preliminary hearing Cheatwood again beat Lyons demanding that he plead guilty (R. 53).

up was sufficient not only to frighten Lyons into a "confession" but also to have a sufficient lasting effect to carry over to subsequent "confessions". This act was admitted by all of the witnesses for the prosecution who were present on the morning of the first confession.

No effort was made by the prosecution to explain how the bones of Mr. and Mrs. Rogers were obtained. It must be noted, however, that these bones were produced twenty-two days after these people were dead and certainly past the time when the bodies should have been buried.

Diligent research has revealed no case as gruesome as this one. The nearest case on this point is *State v. Ellis*,⁵ where the accused was taken to the morgue and forced to put his hand on the deceased. In the *Ellis* case, as in the instant case, the prosecution made no effort to introduce the first confession but introduced a second confession made to the warden of the jail on the next day. The admission of the second confession was held to be error and the conviction reversed by an opinion, part of which stated:

"A prisoner, who had been thus subjected to such rigid inquiry with violence to his person; who had witnessed the gruesome and uncanny scenes mentioned and to whom food and sleep had been denied for so long, would not immediately thereafter be freed from the dominating influences of his experience, and a confession shortly after such treatment had ceased would, in the absence of proof to the contrary, be adjudged involuntary."⁶

The prosecution at no time during the trial of this case made any effort whatsoever to overcome the presumption that the influences which brought about the first confession continued up to the time the second confession was made at

⁵ 294 Mo. 269 (1922).

⁶ 294 Mo. 269, 283.

McAlester, the statements were made to Sheriff Duncan, and the preliminary arraignment.

Although Deputy Sheriff Van Raulston, who was present when the first confession was obtained, and Roy Marshall, who accompanied Van Raulston on the trip to McAlester with Lyons, denied beating Lyons or threatening him prior to the second confession, no effort was made by either of them to give any affirmative evidence to overcome the presumption of the continuation of the influences which brought about the first confession.

Warden Jesse Dunn, who is alleged to have taken the confession at McAlester, was not placed on the witness stand at this time. It is peculiarly significant that the only completely disinterested witness to this confession, the Chaplain at the penitentiary, was at no time called to the witness stand by the prosecution.

This Court has repeatedly set aside convictions based upon confessions secured by protracted and repeated questioning as well as instances of brutality similar to the instant case.⁷ In an effort to circumvent this line of decisions the State of Oklahoma, while refusing to introduce in evidence the first confession, introduced a second confession and an alleged admission made subsequent to the first confession.

Many years ago the principle was established that where a confession is obtained by such methods as to make it involuntary, all subsequent confessions made while the accused is under the operation of the same influence are likewise involuntary.

"When a prisoner has been once induced to confess upon a promise or threat, it is a common practice to

⁷ *Lisenba v. California*, 314 U. S. 219, 239, 240, 86 L. ed. 166, 181, 182 (1941).

Ward v. Texas, 316 U. S. 547, 555, 86 L. ed. 1663 (1942).

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716 (1940).

reject any subsequent confession of the same or like facts, though at a subsequent time."*

In the United States a long line of decisions of state courts has firmly established the same principle as to subsequent confessions where the first is involuntary. There are two cases in which the facts are peculiarly close to the facts in the instant case.

In a Mississippi case there was evidence of brutality in securing a confession by use of "the water cure". The court excluded the confession made to the officer who administered "the water cure" but admitted other confessions and statements made after the first confession was made. The Mississippi Court reversed this conviction stating:

"It clearly appears in the case before us that the original confession in the jail was secured by force and in violation of the law. * * * It is impossible for the reasoning mind to ignore the force and effect that these proceedings had upon these negroes. It would be vain and idle to indulge the hope that the effect was removed from their minds before the confessions were repeated to the state's witness."**

The facts in the case of *Reason v. State*¹⁰ are very similar to the facts in the instant case. In that case Reason, charged with murder, made a confession at the local jail as the result of threats that unless he did so he would be hanged as soon as he reached Holly Springs. This confession was not admitted, but the Court permitted the State, over appellant's objection, to introduce in evidence a second confession made as soon as the prisoner reached Holly Springs. The conviction was reversed because of

* 2 East Pleas of the Crown, 628 (1785).

** *Fisher v. State*, 145 Miss. 116; 132, 110 So. 361 (1926).

¹⁰ *Reason v. State*, 94 Miss. 290 (1908).

the introduction into evidence of the second confession. The opinion stated in part:

“ * * * It is too plain for argument that this reiterated confession was induced by the same cause that underlay the first confession, since the danger of immediate death at Holly Springs could, in the opinion of the prisoner be averted only by adhering to his story * * * ”¹¹

The Criminal Court of Appeals in its opinion in the instant case had no doubt that the circumstances surrounding the first confession made it clearly inadmissible. The opinion stated: “If we were dealing with the first confession in the instant case, as heretofore stated, we would unhesitatingly apply the rule as announced in the *Chambers* case and immediately reverse this case. * * * ” (R. 301). The opinion also stated: “We again emphasize that if the State in the instant case had introduced in evidence confession number one, and relied upon the same following the opinion in the *Chambers* case, we would unhesitatingly reverse this case” (R. 323).

The Criminal Court of Appeals of Oklahoma, however, ruled that the second confession *made on the same day as the first confession*, was admissible. Such an interpretation of the rule of due process of law will permit law enforcement officials to circumvent the rulings of this Court on the admissibility of confessions by following the procedure in the instant case of extorting a confession by force, violence, threats and long periods of questioning and then transferring the prisoner to another place and securing a second confession on the same day. Such procedure if upheld will nullify the long line of decisions of this Court.

This Court in the case of *Canty v. Alabama* (*supra*)

¹¹ 94 Miss. 290, 292.

reversed the decision of the Supreme Court of Alabama in a case where effort was made to substantiate a subsequent confession made under changed circumstances without relying upon the first confession which was obviously extorted by force and violence.

Petitioner requested the trial court to instruct the jury that: "You are instructed that if you find that at the time the confession was obtained at McAlester, that the defendant was still suffering from the treatment that he had received in the County Attorney's office or elsewhere by the officers that had him in custody or was induced to sign the confession by reason of fear as a result of the conduct of the officers that had him in custody and that by reason thereof said confession was not a free and voluntary confession, you are not to consider the confession, or any of the evidence therein contained." This instruction was refused (R. 264-265). The refusal of the trial court to give this instruction was a denial to the petitioner of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The dissenting opinion of Judge Doyle of the Criminal Court of Appeals of Oklahoma pointed out that this instruction should have been given, stating: "The well established rule is that, if a confession has once been obtained through illegal influence, it must be clearly shown that such influence has been removed before a subsequent confession can be received in evidence" (R. 353).

II.

The conviction of petitioner by means of evidence obtained in disregard of the laws of the State of Oklahoma and refusal of the courts to supply any corrective process was a denial of equal protection of its laws and a denial of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The active participation of the State of Oklahoma in denying to petitioner due process of law is apparent from the record:

(1) No warrant for petitioner's arrest appears any place in the record.

(2) Immediately after the crime was committed several prisoners from a nearby prison camp were arrested and charged with the crime so that the Warden of the State Penitentiary was sent to Hugo to make an investigation which resulted in a change of personnel at the prison camp.

(3) During the same period Vernon Cheatwood, investigator for the Governor of Oklahoma, was sent to Hugo and made an investigation during which time the prisoners from the State prison camp were released and W. D. Lyons was arrested. Cheatwood was one of the group questioning and beating Lyons prior to the time of the confession. Cheatwood was in the group of officers who brought Lyons from the State Penitentiary to the court house for his appearance before the magistrate and Cheatwood was present and testified at the trial itself.

(4) The long period of questioning, the beating of petitioner and the placing of the bones of the dead bodies in petitioner's lap all took place in the county prosecutor's office in the court house at Hugo.

(5) Both the county prosecutor and assistant county prosecutor were present during the time that the above acts took place. According to the county prosecutor's own admissions Lyons was struck several times in his presence in the court house immediately prior to the confession, and the county prosecutor had to stop the beating.

(6) Petitioner was "arrested" by civilians on January 11, 1940. He was not officially charged with any crime until he was given a preliminary hearing before a magistrate on January 27, 1940, after the confessions had been obtained. He was not represented by counsel at the preliminary hearing and as a matter of fact, did not have advice of counsel until February 4, 1940.

(7) The information charging petitioner with the crime of murder was not filed until August 29, 1940.

It is thus clear that the officials of the State of Oklahoma "subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding".¹²

The State of Oklahoma has set forth its minimum standards of due process of law by a series of statutes. Some of the pertinent provisions of these statutes are:

Oklahoma Statutes, 1931.

Section 2760. "If the offense charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant or some other magistrate in the County."

Section 2765. "The defendant must, in all cases, be taken before the magistrate without unnecessary delay."

¹² *McNabb v. U. S.* 318 U. S. 332, (1943).

Section 2766. "If the defendant be taken before a magistrate other than the one who issued the warrant, the complaint on which the warrant was granted must be sent to that magistrate, or if it cannot be procured, a new complaint must be filed."

Section 2768. "The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable with the return endorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself."

Section 2793. "When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had."

Section 2794. "He must also allow to the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the county or city as the defendant may name. The officer must, without delay, perform that duty, and shall receive fees therefor as upon a service of a subpoena
* * *"

Section 2795. "The magistrate must without a jury, immediately after the appearance of counsel, or if none appear and the defendant requires the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case
* * *"

Section 2796. "The examination must be completed at one session unless the magistrate for good cause adjourn it."

Section 2799. "At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him"

Section 2800. "Preliminary examination First: The witnesses must be examined in the presence of the defendant, and may be cross-examined by him"

Section 2801: "When the examination of the witnesses on the part of the state is closed, any witnesses the defendant may produce must be sworn and examined."

Judge Doyle in his dissenting opinion in the Criminal Court of Appeals of Oklahoma, after reviewing the statutes and decisions of Oklahoma, was of the opinion that the judgment should be reversed because:

"A defendant in a criminal prosecution is entitled to a legal trial, conducted in accordance with the rules of law; and the question of his guilt or innocence should be determined upon legal evidence.

"Upon a careful review of the record, the authorities cited in the petition for rehearing, and under all of the decisions of this Court, so far as I can recall, I do not believe that the plaintiff in error has been tried and convicted in accordance with law, and did not have that fair and impartial trial which the law guarantees to one charged with crime." (R. 354)

The two most recent decisions in the Supreme Court bearing on this point are *McNabb v. United States*, 318 U. S. 332, and *Anderson v. United States*, 318 U. S. 350. In the *McNabb* case the Supreme Court set aside the conviction of second degree murder because the defendant had been arrested and held for interrogation without arraignment before a committing magistrate within the time required by law. In the *Anderson* case the defendant was convicted of conspiring to damage property of the T. V. A., and the Supreme Court set aside the conviction for the same reason as in the *McNabb* case. The trial court in each instance

went into the question only of whether or not the confession was voluntary and did not go into the question of delay before arraignment.

The Supreme Court reversed the judgments, holding that the voluntariness of a confession is not the sole determinant of its admissibility, for a confession may not be received in evidence if it is made by a person under arrest when the arresting officers have not complied with a statutory duty with respect to arraignment before a commissioner or other committing magistrate. If a confession is procured during a period of illegal detention, it is inadmissible.

A comparison of the Oklahoma Statutes and the provisions of Section 595 of Title 18 of the United States Code shows no difference in the substantive rule of procedure. The Federal law requires the marshal or other officer to take the arrested person before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial. The statute makes no express reference to a temporal element, but the provision has been construed to require arraignment without unnecessary delay.

Section 300 (a) of Title 5 of the United States Code provides that in case the arrest is by an officer of the FBI, and the arrest is without a warrant, the officer shall take the person arrested "immediately" before a committing officer.

In the *McNabb* case the Supreme Court said that to permit the confessions to be the basis of a conviction, when the confessions have been obtained in willful disobedience of the law, or through willful disregard of the procedure required by Act of Congress, "would stultify the policy which Congress has enacted into law" (p. 345).

While the *McNabb* and *Anderson* decisions were in cases in which federal statutes were applicable and the *Lyons* case involves the application of state statutes, the principle

in the *McNabb* and *Anderson* cases is nonetheless applicable in the instant case, for, as was pointed out in the *McNabb* case, review by the Supreme Court of the United States "of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction".

In the instant case the officials of the State of Oklahoma made no effort to comply with the elementary principles of due process of law as outlined by the statutes of Oklahoma. The trial court admitted the evidence obtained in violation of these principles and the Criminal Court of Appeals of Oklahoma sustained this action of the trial judge.

A motion for rehearing was denied by a split vote. Although the judge denying the petition did not file an opinion, Mr. Justice Doyle filed a dissenting opinion based solely upon the question of the denial of due process of law as interpreted by the statutes of Oklahoma and was of the opinion that the case should be reversed on the basis of the *McNabb* case.

Conclusion.

The active participation of the State of Oklahoma, acting through its officials, in denying to the petitioner due process of law and the flagrant disregard for the statutes of the State of Oklahoma as well as the decisions of this Court interpreting the Fourteenth Amendment to the United States Constitution, requires a reversal of the judgment in this case. The refusal of the trial court and the Criminal Court of Appeals of the State of Oklahoma to enforce the laws of the State of Oklahoma as to due process denied to petitioner the equal protection of the laws as guaranteed

by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, it is respectfully submitted that the judgment of the Criminal Court of Appeals of the State of Oklahoma in the above case be reversed.

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